

Internal Revenue Service

memorandum

CC:TL-N-5208-89

VWATERS

date: JUN 21 1989

to: District Counsel, Sacramento W:SAC
Attn: Alan E. Staines

from:
Chief, Tax Shelter Branch CC:TL:TS

subject:

Post Review - [REDACTED]

This memorandum is in response to your March 24, 1989, request for post-review of an advisory opinion issued by your office regarding the above-mentioned partnership.

ISSUES

1. Whether a foreign trust, reported as a partner on Form 1065 and Schedules K-1, must be recognized as a valid partner for purposes of I.R.C. §§ 6221 through 6233 procedures, thereby excluding the partnership from the section 6231(a)(1)(B) exception to those procedures?

2. Whether the various consents to extend the period of limitations for assessment executed pursuant to sections 6229(b)(1)(A) and 6501(c)(4) are valid?

3. Whether the Service and partners can enter into a closing agreement which stipulates whether the deficiency procedures or the TEFRA procedures will be applied?

CONCLUSIONS

1. We concur with your conclusion that the partnership will not qualify for the section 6231(a)(1)(B) small partnership exception to the TEFRA provisions because it has a foreign trust as a partner.

2. We also concur with your conclusion that the various consents to extend the period of limitations for assessment executed pursuant to sections 6229(b)(1)(A) for partnership items and 6501(c)(4) for nonpartnership items effectively extended the period of limitations with respect to the parties signing the consents.

3. We disagree with your conclusion that the Service can enter into a closing agreement which stipulates whether the deficiency procedures or the TEFRA procedures will be applied.

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The Service has no statutory authority to displace the TEFRA procedures if a partnership falls within the definition of a TEFRA partnership.

DISCUSSION

I. Applicability of the Small Partnership Exception

I.R.C. § 6231(a)(1)(B) excepts "small partnerships" from the unified examination and litigation procedures of sections 6221 through 6233. A small partnership is defined as a partnership with 10 or fewer partners, each of whom is a natural person (other than a non-resident alien) or an estate. In addition, each partner's share of each partnership item must be the same as his share of every other partnership item.

The facts outlined in the attached copy of your advisory opinion indicate that the partnership has two partners, [REDACTED] and [REDACTED], a foreign trust. These two partners are the only reported partners listed on all partnership returns and Schedules K-1. Because the partnership has a foreign trust as a partner, we agree with your conclusion that the partnership does not meet the requirements of the small partnership exception. Therefore, the administrative and judicial determinations of partnership items must be made at the partnership level in a unified proceeding rather than in a separate proceeding with each partner. See I.R.C. § 6221. We believe that this position is legally defensible notwithstanding the fact that there exists the possibility the trust will be disregarded for income tax purposes.

II. Validity of Consents

The facts outlined in your advisory opinion also indicate that several consents to extend the period of limitations for assessment were executed pursuant to sections 6229(b)(1)(A) for partnership items and 6501(c)(4) for nonpartnership items. The facts indicate that the following consents were executed:

[REDACTED]
1. Form 872-A - executed for years ending [REDACTED]

[REDACTED] and [REDACTED].

2. Form 872-P - executed by [REDACTED] as tax matters partner for years ending [REDACTED], [REDACTED] and [REDACTED].

3. Form 872-O - executed by [REDACTED] and [REDACTED] as tax matters partners for years ending [REDACTED] and [REDACTED].

Form 872-A - executed for years ending [REDACTED] and [REDACTED].

Under section 6229, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item or affected item for a partnership taxable year shall not expire before the date which is three years after the later of: (1) the date on which the partnership return for such taxable year was filed; or (2) the last day for filing the return for such year (determined without regard to extensions). This period may be extended with respect to any partner, by agreement entered into by the Secretary and that partner, or with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner.

Nonpartnership items and partnership items can also be extended by section 6501(c)(4). However, if the agreement is entered into under section 6501(c)(4), the agreement must expressly provide that it applies to "tax attributable to partnership items and affected items" in order to be effective. I.R.C. § 6229(b)(2). A general extension agreement with a partner under section 6501(c)(4) without specific language referencing partnership items will not extend the TEFRA statute.

With respect to [REDACTED], we agree with your conclusion that the various consents to extend the period of limitations for assessment executed pursuant to sections 6229(b)(1)(A) for partnership items and 6501(c)(4) for nonpartnership items effectively extended the period of limitations with respect to the parties signing the consents. As noted in your opinion, because [REDACTED] was not the partnership's TMP, the consents executed by him for the partnership items operate as an extension only as to his partnership items unless he was authorized by the partnership in writing to enter into such agreements.

With respect to the [REDACTED], the Form 872-0 consent signed by [REDACTED] as TMP for the [REDACTED] and [REDACTED] taxable years should not be relied upon unless the [REDACTED] are in fact beneficiaries of the [REDACTED]. Beneficiaries are indirect partners and are considered partners for purposes of TEFRA. See I.R.C. §§ 6231(a)(9) and 6231(a)(10). Accordingly, if they are beneficiaries of the trust, they are authorized to execute consents to extend the period of limitations for partnership items. If they are not beneficiaries of the trust, the Form 872-0 executed by [REDACTED] is invalid. With respect to the Forms 872-A executed by the [REDACTED], we agree with your conclusion that they were valid to extend the period for assessing nonpartnership items pertaining to them.

You stated in your memorandum that the TEFRA procedures should apply to [REDACTED], [REDACTED] and [REDACTED].

██████████ and that the deficiency procedures should be applied to the ██████████ due to the trust's alleged payment of compensation to ██████████. If the ██████████ are the beneficiaries of the trust, the TEFRA procedures would also apply to them in their capacity as indirect partners. See I.R.C. § 6231(a)(10).

III. Execution of a Closing Agreement

Because there are litigation hazards associated with these conclusions, you suggest that the Service enter into a closing agreement which stipulates whether the deficiency procedures or the TEFRA procedures will be applied. It is our position that the Service is not authorized to enter into a closing agreement with the partners whereby they agree that the deficiency procedures will apply notwithstanding the fact that the partnership failed to meet the requirements of the small partnership exception. The Service has no statutory authority to displace the TEFRA procedures if a partnership falls within the definition of a TEFRA partnership. This conclusion is exemplified by the fact that Congress provided a provision in which small partnerships are authorized to elect to have TEFRA provisions apply but did not provide a parallel provision in which partnerships which fail to fall within the exception can elect to have the deficiency provisions apply. See I.R.C. § 6231(a)(1)(B)(ii).

If you have any additional questions regarding this matter, please contact Vada Waters at (FTS) 566-3289.


KATHLEEN E. WHATLEY

Attachment:
As stated.